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Criminal Procedure—Luggage Found During a Lawful Warrantless Search of an Automobile May Not Be Searched Without a Warrant—Arkansas v. Sanders, 442 U.S. 753 (1979)

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CRIMINAL PROCEDURE—LUGGAGE FOUND DURING A LAWFUL WARRANTLESS SEARCH OF AN AUTOMOBILE MAY NOT BE SEARCHED WITHOUT A WARRANT—*Arkansas v. Sanders*, 442 U.S. 753 (1979).

In *Arkansas v. Sanders*,[1] the U.S. Supreme Court held that in the absence of exigent circumstances, police must obtain a warrant before searching luggage taken from an automobile lawfully stopped and searched for contraband. The majority opinion, written by Justice Powell, sharply restricts further extension of the "automobile exception"[2] to the warrant requirement of the fourth amendment. The Court found the exception inapplicable for two reasons. First, a suitcase in the custody of police lacks the inherent mobility of an automobile.[3] Second, there is a much greater expectation of privacy associated with luggage than is associated with a car.[4] A caustic dissent[5] by Justice Blackman joined by Justice Rehnquist argued that the majority's decision creates an impracticable and confusing rule that makes little sense in terms of fourth amendment policy.[6] This note will examine the interaction in *Arkansas v. Sanders* of the legitimate expectation of privacy doctrine,[7] the "automobile exception,"[8] and the exigent circumstances exception.[9] The note will conclude that despite the ambiguity of the majority's method of determining when a container gives rise to legitimate expectation of privacy, *Sanders* is a reaffirmation of fourth amendment rights which had been threatened by the ever-increasing number of exceptions to the warrant clause.

I. THE FACTUAL SETTING OF *SANDERS*

Following a reliable[10] informant's tip, Arkansas police placed the Little Rock Municipal airport under surveillance and awaited the arrival of Lonnie Sanders.[11] According to the informant, Sanders would embark carrying a green suitcase packed with marijuana. Sanders arrived as pre-

1. 442 U.S. 753 (1979). For other commentary on the *Sanders* decision, see 11 RUT.-CAM. L. J. 169 (1979) and 14 VAL. L. REV. 157 (1979).
2. *See* notes 50–66 and accompanying text *infra* (explanation of the "automobile exception").
3. *See* notes 50–73 and accompanying text *infra*.
4. *See* notes 74–87 and accompanying text *infra*.
5. Arkansas v. Sanders, 442 U.S. 753, 758 (1979) (Blackmun, J., dissenting).
6. *See* note 38 *infra*.
7. *See* notes 39–49 and accompanying text *infra*.
8. *See* notes 50–66 and accompanying text *infra*.
9. *See* notes 67–73 and accompanying text *infra*.
10. For a definition of "reliability," *see, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1958).
11. 442 U.S. 753, 755 (1979).

dicted and was joined by a companion who placed Sanders' green suitcase in the trunk of a taxi. The taxi drove away carrying Sanders, his companion, and the suitcase.[12]

The officers followed the taxi and stopped it in traffic several blocks from the airport. The driver opened the trunk at the officers' request. With neither a warrant nor permission of the suspects, the officers opened the unlocked suitcase and found 9.3 pounds of marijuana.[13] The officers seized the suitcase and arrested Sanders and his companion.[14]

Sanders was indicted for possession of marijuana with intent to deliver.[15] At a pre-trial hearing, Sanders' motion to suppress the marijuana found in the suitcase was denied.[16] Sanders was tried and found guilty.[17] Finding the search of the suitcase unreasonable under the fourth amendment in light of *United States v. Chadwick*,[18] the Arkansas Supreme Court reversed the conviction.[19] The United States Supreme Court affirmed.[20]

II. REASONING OF THE *SANDERS* COURT

The Court framed the issue as whether, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband.[21] The Court distinguished searches under the "automobile exception"[22] to the fourth amendment's warrant requirement[23] from war-

12. *Id.*

13. *Id.*

14. The *Sanders* opinion does not state whether Sanders was arrested before or after the search of his suitcase. The State's brief conceded that the arrest took place after the search. Petitioner's Brief On Writ of Certiorari To The Supreme Court of Arkansas at 3, Arkansas v. Sanders, 442 U.S. 753 (1979).

15. 442 U.S. at 755. Sanders was indicted for a violation of ARK. STAT. ANN. § 82–2617 (1976).

16. 442 U.S. at 756.

17. *Id.*

18. 433 U.S. 1 (1977).

19. 442 U.S. at 756. Sanders v. State, 262 Ark. 595, 559 S.W.2d 704 (1977).

20. 442 U.S. at 766.

21. *Id.* at 754. Given probable cause, police may lawfully stop and seach an automobile without a warrant. Carroll v. United States, 267 U.S. 132 (1925). *See* notes 50–66 and accompanying text *infra*.

22. *See* notes 50–66 and accompanying text *infra*.

23. The fourth amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

rantless searches of luggage and other personal property found inside automobiles.[24] The former are justified by the inherent mobility of automobiles which often makes obtaining a search warrant impracticable.[25] Moreover, there is a lessened expectation of privacy associated with an automobile, because of its configuration, use and regulation.[26] But neither mobility nor a lessened expectation of privacy justifies the warrantless search of luggage.[27] Luggage loses its mobility once officers have it securely within their control.[28] The mobility of the taxi did not attach to Sanders' suitcase, because it came under the exclusive control of the police the moment they lifted it from the trunk.[29] Nor did the contact the luggage had with the car lessen Sanders' expectation of privacy in the suitcase.[30] Luggage is deemed to be a repository of personal effects, and is inevitably associated with an expectation of privacy whether it be placed in a car or stored in a closet.[31] Neither the suitcase's "fundamental character as a repository for personal, private effects"[32] nor the expectation of privacy in it was altered by Sanders' failure to lock the suitcase.[33]

The Court has interpreted the fourth amendment to require a warrant before any search may be undertaken, subject to a few "jealously and carefully drawn [exceptions]." Jones v. United States, 357 U.S. 493, 499 (1958). For exceptions to the warrant requirement, see, *e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of an impounded vehicle); United States v. Santana, 427 U.S. 38 (1975) (hot pursuit); United States v. Watson, 423 U.S. 411, 424 (1975) (consent); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (customs searches); Chimel v. California, 295 U.S. 752 (1969) (search incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); McDonald v. United States, 335 U.S. 451, 454 (1948) (emergency doctrine); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (plain view doctrine); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

24. 442 U.S. at 761.

25. *Id.* The Court has long recognized a difference between the search of structures and readily movable vehicles. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 12 (1977); Chambers v. Maroney, 399 U.S. 42, 49–50 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); Preston v. United States, 376 U.S. 364, 366–67 (1964); Husty v. United States, 282 U.S. 694, 700–01 (1931); Carroll v. United States, 267 U.S. 132, 153 (1925). *See also* notes 60–66 and accompanying text *infra*.

26. 442 U.S. at 761. *See also* Rakas v. Illinois, 99 S.Ct. 421, 436 (1978) (Powell, J., concurring); United States v. Chadwick, 433 U.S. 1, 12 (1977); South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Cady v. Dombrowski, 413 U.S. 433, 441–42 (1973). Nevertheless, an individual operating a car does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. As the Court stated in Delaware v. Prouse, 440 U.S. 648, 662–63 (1979): "Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."

27. 442 U.S. at 762.

28. *Id.* at 762–63.

29. *Id.* at 763–64.

30. *Id.* at 764–65.

31. *Id.*

32. *Id.* at 762–63 n.9.

33. *Id.* In United States v. Chadwick, 433 U.S. 1 (1977), the Court stated:

The Court refused to justify the luggage search under the "automobile exception" and declined an invitation to extend the doctrine of *Chambers v. Maroney*[34] to luggage. In *Chambers*, the Court upheld a warrantless car search, concluding there was no constitutional difference between the seizure of an automobile prior to the issuance of a warrant and an immediate warrantless search of the automobile.[35] Relying on *Chambers*, the State argued in *Sanders* that if the police were entitled to seize the suitcase, they were entitled to search it. The Court disagreed, concluding that because luggage is easily stored, a constitutional requirement that luggage be held until a warrant is obtained is far less burdensome on police departments than would be a similar requirement for cars.[36]

Since the Court found Sanders' expectation of privacy in his suitcase undiminished by its location in the taxi, the warrantless search of the suit-

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By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendentment Warrant Clause.

Id. at 11. Although this dictum in *Chadwick* could be interpreted as requiring a suitcase or footlocker to be locked before an expectation of privacy will be recognized by the Court, *Sanders* makes clear that it is the objective expectation, not the subjective manifestation, of privacy that triggers the fourth amendment's protection. Arkansas v. Sanders, 442 U.S. at 762 n.9.

34. 399 U.S. 42 (1970).

35. *Id.* at 51–52. In *Chambers* the suspects matched the description of persons involved in a gas station robbery that had just occurred. The police stopped the suspects' car in a darkened parking lot and arrested them. Police found evidence linking the suspects to the robbery during the course of an intensive search of the car at the police station. The search could not be justified under the search incident to arrest doctrine because the search did not immediately follow the arrest. The evidence was admitted at trial. In affirming the defendants' convictions, the Court observed:

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" instrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. Some courts have viewed this language as justifying the warrantless search of luggage and other containers found inside cars. *See, e.g.*, United States v. Milhollan, 599 F.2d 518, 526-27 (3rd Cir. 1979); United States v. Ochs, 595 F.2d 1247, 1254 (2nd Cir. 1979); United States v. Young, 567 F.2d 799, 803 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978); United States v. Canada, 527 F.2d 1374, 1379–80 (9th Cir. 1975), *cert. denied*, 429 U.S. 867 (1976); United States v. Hand, 516 F.2d 472, 475–76 (5th Cir. 1975), *cert. denied*, 424 U.S. 953 (1976); United States v. Tramunti, 513 F.2d 1087, 1104 (2nd Cir. 1975), *cert. denied*, 423 U.S. 832 (1975); United States v. Frick, 490 F.2d 666, 669–70 (5th Cir. 1973), *cert. denied*, 419 U.S. 831 (1974); United States v. Evans, 481 F.2d 990, 994 (9th Cir. 1974); United States v. Chapman, 474 F.2d 300, 302–03 (5th Cir. 1973), *cert. denied*, 414 U.S. 835 (1973). *See also* Moylan, *The Automobile Exception: What It Is And What It Is Not—A Rationale In Search Of A Clearer Label*, 27 MERCER L. REV. 987, 1002–03 (1976).

36. 442 U.S. at 765 n.14. One commentator finds it "difficult to believe" that there would be serious burdens on police departments with respect to short-term seizure and detention of a car while a search warrant is sought. 2 W. LAFAVE, SEARCH & SEIZURE §7.2, at 541 n.96 (1978).

case, in the absence of exigent circumstances,[37] violated the warrant requirement of the fourth amendment.[38]

III. BACKGROUND

A. *The Right of Privacy*

Although the Constitution does not explicitly guarantee a right of privacy, its broad principles and purposes have been found to create such a right.[39] The guarantees of the fourth amendment come closest to an express recognition of a constitutionally protected right of personal privacy.[40]

Early interpretations of the privacy right limited the scope of the fourth amendment to certain "constitutionally protected areas" such as the home and office.[41] The Supreme Court first recognized that the fourth amendment's aegis extended to an individual's expectations of privacy in *Katz v. United States*.[42] The *Katz* Court rejected traditional constitutional

37. *See* notes 50–66 and accompanying text *infra* (discussion of "exigent circumstances").

38. 442 U.S. at 765–66. Chief Justice Burger and Justice Stevens, concurring in *Sanders*, stated that the relationship between the suitcase and the car was purely coincidental and therefore the case did not call for an application of the "automobile exception." *Id.* at 766–67. The concurring justices declined to state whether a stronger or weaker case for requiring a warrant to search a suitcase in a car would be made if police had probable cause to believe contraband was located somewhere in the vehicle, but did not know whether it was inside the suitcase or concealed in some part of the car's structure. *Id.*

Mr. Justice Blackmun, joined by Mr. Justice Rehnquist, dissented. Justice Blackmun analogized suitcases to cars and would have applied the *Chambers* doctrine to luggage. Justice Blackmun argued that it would be inconsistent to allow the warrantless search of an automobile while forbidding the search of any luggage found therein. Blackmun was persuaded that luggage, like an automobile, is mobile. Furthermore, the expectation of privacy associated with a suitcase found in a car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk. Finally, Justice Blackmun argued that it will be virtually impossible for courts to determine coherently which containers deserve the protection of the fourth amendment and which do not under the "legitimate expectation of privacy" doctrine. *Id.* at 768–72. *See* notes 74–91 and accompanying text *infra*.

39. Roe v. Wade, 410 U.S. 113 (1973); O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENGLAND L. REV. 662, 672 (1978). *See generally* Warren and Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). *See also* THE FEDERALIST No. 84 (A. Hamilton).

40. O'Brien, *supra* note 39, at 673. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51–78 (1937). *See generally* A. AMSTERDAM, PERSPECTIVES ON THE FOURTH AMENDMENT (1974); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966).

41. *E.g.*, Berger v. New York, 388 U.S. 41, 59 (1967); Lanza v. New York, 370 U.S.139, 143–44 (1962); Silverman v. United States, 365 U.S. 505, 512 (1961). *See generally*, A. AMSTERDAM, *supra* note 40, at 356–59, 381.

42. 389 U.S. 347 (1967). *See* Note, *A Reconsideration of the Katz Expectation of Privacy Test*,

formulas that defined the fourth amendment's scope in terms of property interests on the ground that the fourth amendment "protects people, not places"[43] and protects "what [an individual] seeks to preserve as private."[44] *Katz* became the basis of a new formula for determining fourth amendment coverage: "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . [that individual] is entitled to be free from unreasonable governmental intrusion."[45]

United States v. Chadwick,[46] *Sanders'* forerunner, applied the *Katz* doctrine to the question whether a search warrant is required before federal agents may open an arrested person's locked footlocker, lawfully seized from the trunk of a parked car.[47] The Court found that the defendant had a legitimate expectation of privacy in his footlocker.[48] Given the lack of exigent circumstances, the warrantless search of the footlocker violated the fourth amendment.[49]

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76 MICH. L. REV. 154, 156 (1977); A. AMSTERDAM, *supra* note 40, at 382–83.

43. 389 U.S. at 351. In *Katz*, police eavesdropped on the defendant's conversation in a public pay telephone booth by means of an electronic device attached to the outside of the booth. *Katz* overruled Olmstead v. United States, 277 U.S. 438 (1928), which held that telephone wiretapping was not a "search" or "seizure" and was therefore outside the scope of the fourth amendment. 277 U.S. at 464–66. *See* A. AMSTERDAM, *supra* note 40, at 356–65. The *Katz* Court found that the defendant had an expectation that his conversation while in the phone booth would remain private. Since the Government's action violated the privacy upon which the defendant justifiably relied, the electronic eavesdropping constituted a search and seizure within the meaning of the fourth amendment. 389 U.S. at 353.

44. 389 U.S. at 351.

45. Terry v. Ohio, 392 U.S. 1, 9 (1968). Before *Katz*, the Court focused on the concept of a "constitutionally protected area" to define the scope of the fourth amendment's protection of "persons, houses, papers and effects." *E.g.*, Berger v. New York, 388 U.S. 41, 59 (1966). *Katz* focused instead on the person, not the place, and concluded that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," while "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351–52. The basic question whether the government has violated the privacy upon which an individual justifiably relied remains the starting point for the determination of fourth amendment coverage. *See* A. AMSTERDAM, *supra* note 40, at 357–58. Professor Amsterdam believes the "reasonable expectation of privacy" formula destroys the spirit of *Katz* and most of its substance. *Id.* at 383. He notes that the formula should not be construed to suggest that a particular kind of government activity labeled an "intrusion" is necessary to trigger the fourth amendment. Nor should the word "expectation" refer to an actual, subjective expectation of privacy, because "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on televison that 1984 was being advanced . . . and that we were all forthwith being placed under comprehensive electronic surveillance." *Id.* at 384.

46. 433 U.S. 1 (1977).

47. *Id.* at 3.

48. *Id.* at 11.

49. 433 U.S. at 15. Justice Blackmun, dissenting, suggested that if the federal agents had postponed the arrest until the car was in motion, "then the car could have been seized, taken to the agents' office, and all its contents—including the footlocker—searched without a warrant." *Id.* at 22–23. Justice Brennan's concurring opinion predicted the *Sanders* analysis: "In my view, it is not at all obvious that the agents could legally have searched the footlocker had they seized it after [the

B. The Automobile Exception

Although automobiles are within the scope of the fourth amendment, they are exempt from the warrant requirement because of their mobility. The "automobile exception" orginated in *Carroll v. United States*.[50] The *Carroll* Court held that probable cause to believe that a vehicle contains evidence of crime coupled with the exigency of a car's mobility will justify a warrantless search.[51] *Carroll* has been held to permit police intrusion into every part of a vehicle.[52]

Chambers v. Maroney[53] added a new dimension to the *Carroll* search: where police safety requires, the search of the car may be postponed a reasonable length of time and carried out at the police station without a warrant.[54] As the *Chambers* Court noted, the car's mobility and the probable cause still exist at the station.[55] Since the practical effect of an immediate search without a warrant and immobilization until a warrant is obtained is the same, either course is constitutional.[56]

Although the facts of *Carroll* and *Chambers* presented only the issue of the warrantless search of cars, not containers within cars, lower courts extended application of the principles enunciated in those cases. Probable cause coupled with the exigency of mobility were often found sufficient to justify the warrantless search of luggage and other containers found in cars properly stopped and searched under the "automobile exception."[57] Since the Supreme Court had already declared the warrantless search of a

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defendants] had driven away with it in their car . . . ." *Id.* at 16–17. "While the contents of the car could have been searched pursuant to the automobile exception, it is by no means clear that the contents of locked containers found inside a car are subject to search under this exception, any more than they would be if the police found them in any other place." *Id.* at 17 n.1.

50. 267 U.S. 132 (1925). In *Carroll*, federal agents fortuitously came across a vehicle driven by suspected rum-runners. An immediate search of their automobile revealed 68 bottles of liquor hidden behind the upholstery of the seats.

51. *Id.* at 160–62.

52. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (glove compartment); Texas v. White, 423 U.S. 364 (1975) (passenger compartment); Cady v. Dombrowski, 413 U.S. 433 (1973) (trunk); Chambers v. Maroney, 399 U.S. 42 (1970) (concealed compartment under dashboard). The facts of *Carroll* did not demand resolution of the issue whether the warrantless search of a container found in a properly searched automobile would be constitutional.

53. 399 U.S. 42 (1970).

54. *Id.* at 51–52.

55. *Id.* If the fourth amendment permitted the seizure and immobilization of an automobile until a warrant could be obtained, the mobility might not exist at the police station. In that event, the *Chambers* analysis would rest on a faulty premise.

56. 399 U.S. at 51–52.

57. *See e.g.*, United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977); United States v. Giles, 536 F.2d 135 (6th Cir. 1976); United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), *cert. denied*, 429 U.S. 867 (1976); United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975), *cert. denied*, 423 U.S. 832 (1975).

car's trunk,[58] glove compartment,[59] and upholstery[60] constitutional, it seemed logical to courts to extend the "automobile exception" to include containers found inside the automobile.[61]

The *Chadwick* Court, however, refused to extend the rationale of *Chambers* to justify the warrantless search of the defendant's footlocker. The Court found *Chambers* inapplicable because a footlocker has neither the mobility nor the lessened expectation of privacy associated with cars.[62] Some courts interpreted *Chadwick* to mean that the Supreme Court would not create a new warrant exemption for luggage, but continued to allow the warrantless search of luggage found in a car under the "automobile exception."[63] Others recognized that *Chadwick* mandated a reappraisal of the boundaries of the "automobile exception."[64]

The *Sanders* Court attempted to clarify the principles enunciated in *Chadwick,* and emphasized that exceptions to the warrant requirement are based upon societal needs that outweigh the individual's right of privacy.[65] Because no sufficiently compelling societal need would be served by allowing such a serious intrusion into Sanders' fourth amendment right of privacy, the automobile exception did not justify a warrantless search beyond the taxi and its component parts.[66]

C. *Exigent Circumstances*

Although the Supreme Court has expressed a preference for the use of warrants whenever feasible,[67] emergency situations have traditionally

58. Cady v. Dombrowski, 413 U.S. 433 (1973).

59. Cooper v. California, 386 U.S. 58 (1967).

60. Carroll v. United States, 267 U.S. 132 (1925).

61. *See, e.g.,* United States v. Milhollan, 599 F.2d 518 (3rd Cir. 1979). *See also* United States v. Finnegan, 568 F.2d 637, 641 (9th Cir. 1977), wherein the court stated:

> Were we to rule that *Chadwick* applies here and renders the search of the suitcase illegal, inconsistent and contradictory results would follow. For instance, a police officer could seach and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car.

62. 433 U.S. 1, 15–16 (1977).

63. *See* United States v. Ochs, 595 F.2d 1247, 1254 (2nd Cir. 1979); United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978); United States v. Finnegan, 568 F.2d 637, 641 (9th Cir. 1977).

64. *See* United States v. Vickers, 599 F.2d 132 (6th Cir. 1979); United States v. Johnson, 588 F.2d 147 (5th Cir. 1979); United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978); United States v. Ester, 442 F. Supp. 736 (S.D.N.Y. 1978). *See also* Note, *United States v. Chadwick and The Lesser Intrusion Concept: The Unreasonableness of Being Reasonable,* 58 B.U.L. REV. 436 (1978); Comment, 24 N.Y.L.S.L. REV. 481 (1978).

65. 442 U.S. at 758–60.

66. *Id.* at 762. Once the police had seized Sanders' suitcase and had taken Sanders and his companion into custody, there was no remaining societal need to justify a further invasion of Sanders' privacy. The police then had ample time to present the issue of probable cause to a magistrate before searching the suitcase.

67. Gerstein v. Pugh, 420 U.S. 103, 113 (1975); Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong

given rise to warrant exceptions.[68] The Court has recognized a wide variety of circumstances as "exigent."[69] The *Chadwick* Court defined exigent circumstances in luggage search cases as the danger that the suspect "might gain access to the property to seize a weapon or destroy evidence."[70] Exigent circumstances are to be determined after police have seized the object to be searched and have it securely within their control.[71] Thus, while mobility and a lessened expectation of privacy in an automobile justify its search,[72] neither mobility nor the possibility that the suspect will obtain a weapon or destroy evidence justifies the search of a container or package once police have it securely within their control. Because the police obtained exclusive control over Sanders' suitcase, there was no remaining exigency to justify its search.[73]

Sanders, like *Chadwick,* narrows the definition of exigent circumstances to instances in which the preservation of evidence or the safety of the police and public require that a suspect's container be searched without a warrant.

IV. ANALYSIS OF THE *SANDERS* DECISION

Sanders inescapably required resolution of the conflict *Chadwick* avoided between the "automobile exception" and the search of luggage found inside automobiles.[74] Although the *Sanders* Court correctly concluded that the "automobile exception" did not justify the search of Sanders' suitcase, the decision would have been more meaningful for the po-

Sun v. United States, 371 U.S. 471, 479–482 (1963).

68. *See, e.g.,* Ker v. California, 374 U.S. 23, 39–40 (1962).

69. *See, e.g.,* Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757 (1966) (destruction of evidence). The Court has also upheld the warrantless search of an automobile based upon its mobility even though the police were holding the defendant and his car keys at the time of the search. Cardwell v. Lewis, 417 U.S. 583 (1974). *See also* Note, *Misstating The Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches,* 28 SYRACUSE L. REV. 981 (1977).

70. 433 U.S. at 15.

71. Arkansas v. Sanders, 442 U.S. 753, 763 (1979).

72. This principle is inherent in the automobile exception. *See* notes 50–66 and accompanying text *supra.*

73. In *Sanders* there was no indication that the police believed Sanders or his companion were carrying weapons or explosives in the suitcase. Once the police lifted it from the trunk, the danger of destruction of evidence ceased.

74. Because the footlocker in *Chadwick* had been placed in the trunk of a parked car only minutes before the federal agents seized it, the government declined to argue the validity of the search under the "automobile exception," claiming instead that the footlocker should be analogized to an automobile to create a new "baggage exception" based upon mobility. Consequently, the *Chadwick* Court did not resolve the issue whether luggage found in a car could lawfully be searched under the "automobile exception."

lice, the public, and the courts if it had presented workable guidelines to assist in the determination whether a legitimate expectation of privacy exists in containers other than luggage.

The Court was correct in its distinction between luggage and automobiles because luggage possesses none of the characterisitics of automobiles that justify their warrantless search. Its function is not transportation, and its contents are usually not in plain view. Nor is luggage subject to registration, licensing, or routine official inspection.[75] Thus, while both automobiles and luggage are within the scope of the fourth amendment, a person's expectation of privacy in luggage is substantially greater than in an automobile. This greater expectation of privacy requires adherence to the warrant clause regardless of where the luggage to be searched is found.[76]

Nevertheless, as Justice Blackmun observed in his dissent from the majority opinion in *Sanders*,[77] the subjective expectation of privacy associated with a suitcase and a glove compartment or trunk may be virtually the same. Although Blackmun was persuaded that the incongruity in the majority's promulgation of a different policy on warrantless search for areas associated with a similar privacy expectation rendered the *Sanders* opinion illogical, the distinction between the search of luggage and the search of a glove compartment or trunk is not based upon a supposed difference in the privacy expectation associated with each area. Because a glove compartment is an integral part of the automobile, police cannot obtain exclusive control over it as they can over a suitcase. If the automobile cannot be detained while a warrant is sought, the opportunity to search the car, the glove compartment, and the trunk is fleeting and therefore exigent circumstances justifying a warrantless search exist. Thus, the exigency of mobility overrides the expectation of privacy in a glove compartment or trunk, even though that expectation may be equal to the expectation of privacy in a suitcase found in the same car. Although the impracticality of requiring a warrant for the search of a glove compartment or trunk precludes those areas from receiving the full protection of the fourth amendment, their exception from the warrant requirement does

75. Luggage is subject to inspection upon border entry or common carrier travel, however. Arkansas v. Sanders, 442 U.S. 753, 764 n.12 (1979); United States v. Chadwick, 433 U.S. 1, 13 (1977).

76. Presumably doctrines such as search incident to arrest and exigent circumstances could justify the warrantless search of luggage, whether or not the luggage was found in a car. Thus, if a suspect has access to the luggage and police have probable cause to believe it contains weapons or destructable evidence, an exigency exists to justify the warrantless search of the luggage. Arkansas v. Sanders, 442 U.S. 753, 763 n. 11 (1979). *See* note 23 *supra* for a list of exceptions to the warrant requirement.

77. 442 U.S. at 769.

not demand a similar policy for the search of luggage. The fourth amendment guarantee of privacy should be fully implemented within the bounds of legitimate societal law enforcement concerns. In the absence of a compelling societal requirement for a warrantless search, logic should not be invoked to prohibit the protection of one private area simply because all similar areas cannot pragmatically be protected.

Although *Sanders* dealt only with the search of a suitcase, the Court noted somewhat crypticaly that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment."[78] Thus, while all containers and packages are presumably within the scope[79] of the fourth amendment, the content[80] of the amendment may vary with the type of container. Some containers may not be protected by the warrant requirement at all.[81] Although the Court did not specify the formula for determining which containers deserve the full protection of the fourth amendment, the Court stated that some containers by their very nature cannot support a legitimate expectation of privacy because their contents can be inferred from their outward appearance.[82] The contents of such containers are, in effect, in "plain view," and thereby subject to lawful seizure.[83] But the Court's observation that a container holding contraband in "plain view" will not deserve the full protection of the fourth amendment merely restates a traditional exception and does little to clarify the scope of *Sanders'* prospective application.[84]

The *Sanders* Court admitted that there will be "difficulties" in determining which parcels taken from an automobile require a warrant for their search.[85] This suggests that the Court contemplated something more than

78. *Id.* at 764 n.13.

79. For the definition of the fourth amendment's "scope," see note 81 *infra*.

80. For the definition of the fourth amendment's "content," see note 81 *infra*.

81. *See* note 23 *supra* (text of fourth amendment). The words "searches and seizures" and the words "persons, houses, papers and effects" limit the scope of the fourth amendment. Thus, if the governmental intrusion is not a "search" or "seizure" of "persons, houses, papers [or] effects," the fourth amendment does not require it to be reasonable. *See* A. AMSTERDAM, *supra* note 40, at 356–57. Once the governmental intrusion is determined to be a search or seizure, the fourth amendment's content may or may not require a search warrant.

82. 442 U.S. at 764–65 n.13. The Court identified burglar tool kits and gun cases as examples of such items.

83. Because a search is not conducted when officers look at what is in plain view, Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam), a container that constructively places its contents in "plain view" by its outward shape, such as a gun case, may also be seized without a warrant.

84. Furthermore, if *Sanders* means that all containers and packages deserve the full protection of the fourth amendment unless their contents are in "plain view," then dissenting Justice Blackmun's criticism of the legitimate expectation of privacy rule is unfounded, because the "plain view" doctrine is easily applied to a wide variety of containers. *See* note 38 *supra* (Justice Blackmun's dissenting opinion).

85. 442 U.S. at 764–65 n.13.

a simple application of the "plain view" doctrine[86] to parcels taken from an automobile during a lawful warrantless search.[87] If the Court anticipates some gradation of the privacy interest in various containers and packages, then specific guidelines for determining the level of the privacy interest and the corresponding content of the fourth amendment are in order.

V. PROPOSAL

An expectation of privacy in a container which triggers the warrant clause should be one that is recognized as legitimate by society as determined by an objective standard. This determination should include an analysis of the extent the container is commonly used as a repository for personal effects.[88] The transparency or opacity of the container should also be considered,[89] because there can be no expectation of privacy in objects stored in "plain view." The permanence of the container should be relevant to the privacy expectation, since protection of the contents would be a major purpose of the container.[90] The individual's manifestation of a subjective expectation of privacy in the container could enhance or detract from the initial determination of the privacy expectation in close cases. If the fourth amendment guarantee of privacy is to be taken seriously, however, the contents of the container should be irrelevant to the privacy expectation in order to prevent the fourth amendment from becoming a tool for the implementation of government policy.[91] Such an

86. An application of the plain view doctrine is unlikely to cause any "difficulties."

87. One court has interpreted *Sanders* to require only an application of the plain view doctrine and not any "gradations of privacy interests" scheme. United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979).

88. The *Sanders* Court identified luggage as a common repository of personal effects, a factor supporting the Court's conclusion that luggage deserves the protection of the warrant clause. 442 U.S. at 762. In contrast, plastic and burlap bags of the type "customarily used to haul marijuana" will not support a legitimate expectation of privacy. United States v. Stevie, 578 F.2d 204 (8th Cir. 1977), *modified*, 582 F.2d 1175, 1180 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979).

89. If the container is transparent, it should be subject to warrantless search under the "plain view" doctrine. Furthermore, if the appearance of the container makes known its contents, it will be subject to search under *Sanders*. *See* note 83 *supra*.

90. Professor LaFave suggests that the expectation of privacy in containers like paper bags found in cars exists not so much because of the bag itself, but because of the protection the bag receives from the structure of the car. *See* 2 W. LAFAVE, *supra* note 36, §7.2 at 542–43 (1978).

91. As Justice Frankfurter stated:

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when involved on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

Davis v. United States, 328 U.S. 582, 597 (1946) (dissenting opinion). *But see* United States v. Stevie, 582 F.2d 1175, 1181 (8th Cir. 1978) (Gibson, J., dissenting), *cert. denied*, 443 U.S. 911

approach should help to establish specific criteria for the determination of the privacy expectation in a container, while preserving the flexibility needed for case-by-case resolution of fourth amendment questions.

VI. CONCLUSION

Sanders is an attempt by the Court to reaffirm the validity of the presumptive warrant requirement. In its resolution of the conflict between the *Katz* doctrine and the "automobile exception," the Court has placed severe limits on the extent to which the "automobile exception" will justify the warrantless search of containers found within cars. Nevertheless, the existence of exigent circumstances, such as the threat of destruction of evidence or harm to police officers or the public, may justify the warrantless search of luggage found in an automobile, although the exigency will usually disappear once police have the container within their exclusive control. Proper application of *Sanders* will be difficult, however, since the Court did not clarify the criteria for determining the expectation of privacy in a container. Notwithstanding this uncertainty, *Sanders* is a significant step toward a revitalization of the fourth amendment right of privacy.

Suzanne Oliver

(1979) ("'[H]ow much 'legitimate' expectation of privacy should a person be permitted to enjoy in the concealment and transportation of contraband?'").